KAWOOD SDN BHD

v.

HSBC BANK MALAYSIA BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[SUIT NO: 22-23-00-II]
29 NOVEMBER 2001

CIVIL PROCEDURE: *Injunction - Interim injunction - Triable issues - Injunction by company to prevent appointment of receiver and manager - Debenture - Failure to comply with notice of demand - Whether appointment of receiver and manager in accordance with terms of debenture - Whether no triable issues - Rules of the High Court 1980, O. 29*

COMPANY LAW: *Debenture - Scope of liability - Overdraft facilities - Failure to comply with notice of demand - Appointment of receiver - Whether in accordance with terms of debenture - Whether justified - Rules of High Court 1980, O. 29*

On 26 May 1987, the plaintiff obtained overdraft facilities of RM3.45 million from the first defendant and as security thereof executed a debenture in favour of the latter. The debenture was stamped up to RM3 million over the assets of the plaintiff. Subsequently, on 21 October 1998, the plaintiff executed a Corporate Guarantee of RM35 million in favour of the first defendant to secure the liability of one Jafuong Plywood Corporation Sdn Bhd ('Jafuong').

On 24 November 1999, the first defendant issued a letter of demand to the plaintiff pursuant to the terms of the corporate guarantee seeking payment of RM45 million, being the amount owed by Jafuong. And on 5 January 2000, the first defendant demanded from the plaintiff payment of RM1,001,095.55 being the outstanding sum under the overdraft facilities.

The plaintiff did not comply with both the demands, whereupon the first defendant proceeded to appoint a receiver and manager and served the plaintiff with a notice to that effect. The plaintiff alleged that the first defendant was not entitled to appoint any receiver and manager, as the debenture was not intended to secure any liabilities of the plaintiff in excess of RM3 million. The plaintiff, in the circumstances, applied for an injunction to restraint the first defendant from appointing the second and third defendants as receiver and manager, and also to restraint the second and third defendants from acting as receiver and manager of the plaintiff.

Held:

[1] Three questions need to be considered before deciding whether or not to grant an interim injunction, namely: (i) whether there is a serious question to be tried; (ii) if so, whether damages would constitute an adequate remedy; and (iii) whether upon a consideration of the balance of convenience the court should grant an interim injunction and maintain the *status quo*. (p 367 e-f)

[2] The plaintiff ought to be fully aware that the execution of the corporate guarantee under the name of the company was for the benefit of Jafuong. Therefore, it must be within the plaintiff's contemplation that the guarantee was to include the amount owing under the account. It would be ludicrous to expect that all the documents dated and executed in 1987 be so stamped as to cover contingent liability coming into existence some 11 years later. (pp 368 i & 369 g)

[3] The terms of the debenture were clear. They specifically included all other sums due under the guarantees and not in any way limited to RM3 million. When the wordings of the monies clause are clear and unambiguous, effect must be given to the same. (p 369 c)

[3a] Even assuming that the debenture was only up to RM3 million and did not cover Jafuong's liability, the fact remained that the plaintiff had not settled the amount due under the facilities despite demand therefore having been made by the first defendant. Thus the first defendant was entitled to appoint a receiver and manager as provided for under the debenture. The second and third defendants, therefore, were rightly appointed as receiver and manager. (pp. 369 h & 371 c-d)

[4] Clause 3 of the debenture made it clear that the pre-condition mentioned by the plaintiff for issuance of a notice only applies to matters in cl. 3(a) and (g) thereof. The provision for the overdraft facilities, on the other hand, is under cl. 3(b), and the same is repayable on demand. (p 371 b-c)

[5] There are no triable issues or questions to be tried. Consequently, the question of adequacy of damages is no more relevant. (p 371 f-g)

[Application dismissed.]

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 ***(refd)***

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Bank of India v. Trans Continental Commodity Merchants Ltd [1982] 1 Lloyd's Rep 506 ***(refd)***
Cambridge Credit Corporation Limited & Anor v. Lombard Australia Limited [1977] 136 CLR 608 ***(refd)***
Mohamed Zainuddin Puteh v. Yap Chee Seng [1978] 1 MLJ 40 ***(refd)***
Sabah Bank Bhd v. Ho Juan Hua & Anor [1993] 3 MLJ 113 ***(refd)***
Sivapureman v. Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 ***(refd)***
The First National Bank of Chicago v. Lam Thoo Sang & Ors [1980] 1 MLJ 260 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 29

For the plaintiff - Sim Pek Ling (Grace Tan); M/s Chong Brothers Advocs
For the 1st defendant - Stanley Eddy; M/s Battenberg & Talma Advocs
For the 2nd & 3rd defendants - Wong Siong Tung; M/s Tan, Yap & Tang Advocs

Reported by WA Sharif

JUDGMENT

Zakaria Sam JC:
Pursuant to O. 29 of the Rules of the High Court 1980 (after this RHC), the plaintiff took out a summons-in-chambers dated 26 February 2000, applying, *inter alia*, for the following orders:

(a) An order for interim injunction to restrain the 2nd defendant and the 3rd defendant or their servants or agents from taking any action or step to act as a receiver and manager of the plaintiff; and

(b) An order for interim injunction to restrain the 1st defendant from appointing or taking any step or further step; to appoint or to instruct the 2nd defendant and the 3rd and/or any other person as a receiver and manager of the plaintiff premised on the debenture dated 14 October 1987.

Brief Facts
On 26 May 1987, the 1st defendant offered the following banking facilities to the plaintiff for a total sum of RM3.45 million ie, overdraft of RM1.0 million, loan of RM2.0 million and a guarantee of RM45 million. The plaintiff accepted the said offer. Amongst the securities executed by the plaintiff was a debenture dated 14 October 1987. It must be noted that the said debenture was stamped up to RM3 million in favour of the 1st defendant over the assets of the plaintiff (see exh. LLK2 to the plaintiffs affidavit – encl. 5). This material fact was acknowledged by the plaintiff (see exh. LLK4 to encl. 5).

On 21 October 1998, the plaintiff executed a separate corporate guarantee for RM35 million (see exh. LLK10 to encl. 5) in favour of 1st defendant, for the purpose to secure the liability of Jafuong Plywood Corporation Sdn Bhd (after this Jafuong).

On 26 August 1999, the plaintiff wrote to the 1st defendant (exh. LLK8 to encl. 5), requesting the 1st defendant to furnish the total amount outstanding under the overdraft facilities for it to effect the discharge of the debenture. In response thereto, the 1st defendant informed the plaintiff *vide* letter dated 16 November 1999 (see exh. LLK9 to encl. 5), that in view of the corporate guarantee executed by the plaintiff for the benefit of Jafuong, the total amount outstanding to effect the discharge of the plaintiffs debenture would be the total amount outstanding under the banking facilities as well as the amount owed by Jafuong. The sum due under the banking facilities was RM951,390.81 as at 14 November 1999 together with interest accrued thereon and the amount owed by Jafuong was in excess of RM45 million.

On 24 November 1999, the 1st defendant issued a letter of demand to the plaintiff pursuant to the terms of the corporate guarantee (see exh. HSBC2 to encl. 11), seeking for payment from the plaintiff of the amount owed by Jafuong pursuant to the facilities granted by the 1st defendant to Jafuong and guaranteed by the plaintiff. The plaintiff has to date refused to pay the sum.

On 5 January 2000, the 1st defendant also demanded payment from the plaintiff for the outstanding sum of RM1,001,095.55 as at 2 January 2000, together with interest accrued thereon under the overdraft facilities granted to the plaintiff within the time period as stipulated therein, failing which the 1st defendant shall proceed to take the necessary legal action and/or, *inter alia*, exercise all its remedies under the security documents including the appointment of a receiver and manager (see exh. 15 LLK13 to encl. 5). The said letter of demand was delivered to the plaintiff on 19 January 2000. The plaintiff failed to pay the sum demanded.

On 9 February 2000, two representatives of 2nd and 3rd defendants went and took over the plaintiffs factory and premises and the plaintiff was also served with a notice of appointment of receiver and manager. Although the plaintiff had on the same day offered to pay the total amount owing under the overdraft facilities granted to discharge the debenture, the 1st defendant refused to accept full payment of the overdraft facilities because it was not sufficient to discharge the debenture.

On 18 February 2000, the plaintiff wrote to the 1st defendant and copied that letter to the 2nd and 3rd defendants (see exh. LLK14 to encl. 5), *inter alia*, challenging the validity of the appointment of the receiver and manager and

delivered to the 1st defendant's solicitors a cheque in the sum of RM1,012,741.64 (see exh. LLK15) being full payment due under the overdraft facilities, based on the plaintiff's own calculation as at 18 February 2000. The 1st defendant refused to accept the said sum paid by the plaintiff.

Hence, the plaintiff filed this suit, followed by the present application.

The Law

In *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, Lord Diplock expressed that the object of the interlocutory injunction is to protect the plaintiff against injury of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

Three factors need to be considered in deciding whether or not to grant an interim junction. Firstly, there must a serious question or issue to be tried, ie, whether there is a triable issue that the plaintiff would have a real prospect of succeeding in his claim at the trial and that the plaintiffs case is not frivolous or vexatious. Secondly, whether damages would constitute an adequate remedy, ie, whether the plaintiff would be adequately compensated in damages for the defendants' activities if the plaintiff was to succeed. The court would only need to consider this factor in the event it is held that there are serious issues to be tried. Thirdly, a consideration of the balance of convenience and if the relevant factors were evenly balanced, the court should grant an interim injunction which would maintain the *status quo*. [See *American Cyanamid Co (supra), Mohamed Zainuddin b Puteh v. Yap Chee Seng* [1978] 1 MLJ 40, *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461].

Are There Serious Issues To Be Tried?

Basically, the plaintiff raised three issues in this application, which are:

(1) The scope of the debenture – whether the debenture encompasses the corporate guarantee given by the plaintiff in respect of banking facilities granted by the 1st defendant to Jafuong;

(ii) Whether the 1st defendant had issued notice under cl. 3 of the debenture;

(iii) The right to appoint a receiver and manager under the debenture.

The Scope Of The Debenture

The plaintiff alleged that the said debenture was given essentially to secure the sum of RM3 million and nothing more. It was explained by the plaintiff that Mr Wong Kwong Sii, the then branch manager of the 1st defendant in Sibu, represented and assured the plaintiff that the debenture was only a formality and the said debenture would only be limited to a principle sum of RM3 million (with interest thereon) and was not intended to secure any liabilities of the plaintiff in excess of the said RM3 million. The plaintiff contended that as a result of those representations and assurances, it gave rise to a collateral agreement existing side by side with the said debenture and the banking facilities granted by the 1st defendant to the plaintiff. In short, the basis of the plaintiffs claim is that the debenture is only for securing RM3 million and must not include the sum due under the corporate guarantee.

It is useful at this juncture to refer to the relevant part of cl. 1 of the debenture which, *inter alia*, read as follows:

> ... The Company undertakes that it will on demand pay to the Bank the balance which is owing to the Bank on the current **or other accounts of the Company** ... in respect of moneys which the Company shall become liable to the Bank in any manner whatsoever ...PROVIDED ALWAYS and it is hereby agreed that the properties hereby charged shall be a continuing security to the Bank irrespective of whether at any time or times through the duration of this ALL-MONIES DEBENTURE ...not only for all monies actually debited or owed to the said account ... but also with the payment of all monies outstanding and payable then or at any future date or dates on ... **guarantee or otherwise however** for which the Company may be absolutely or contingently liable to the Bank ... [emphasis added].

The case of *Cambridge Credit Corporation Limited & Anor v. Lombard Australia Limited* [1977] 136 CLR 608 defined the meaning of "money owing due or payable ... upon any account whatsoever" as not only liabilities which arise subsequently to giving of the mortgage whilst it subsists but also liabilities which are contingent during the subsistence of the mortgage. If it be owing upon another account, because it is owing by the mortgagor in its capacity as a guarantor, it is none the less owing on an account which falls within the meaning "upon any account whatsoever".

The case of *Sabah Bank Bhd v. Ho Juan Hua & Anor* [1993] 3 MLJ 113, suggested that at the time of execution of guarantee, the parties who signed it are fully aware that the account under the name of the company was for the benefit of another company, it must be within their contemplation that the guarantee was to include the amount owing to that account.

As the director of the plaintiff, it could not be gainsaid that Dr Philip ought to be fully aware that the execution of the letter of guarantee under the name

of the company was for the benefit of Jafuong. Therefore, it must be within the plaintiffs contemplation that the guarantee was to include the amount owing under the account.

In the case of *The First National Bank of Chicago v. Lam Thoo Sang & Ors* [1980] 1 MLJ 260, it was held that the letter of guarantee and debenture must be read together. The case also decided that under the guarantee, the 1st defendant and three other defendants, jointly and severally acknowledged that the debenture was subscribed for and on condition and in part consideration that they would jointly and severally give the guarantee set out therein.

The terms of the debenture are clear. They specifically include all other sums due under the guarantees. It is not in any way limited to RM3 million only. When the wordings of all the monies clause are clear and unambiguous, effect must be given to the same (see *Bank of India v. Trans Continental Commodity Merchants Ltd* [1982] 1 Lloyd's Rep 506). For that, s. 92 of the Evidence Act is also relevant.

Even assuming for a moment that there were representations and assurances given by the then branch manager of Sibu Branch of the 1st defendant. It is pertinent to note that they were not misleading at all. We must look at the surrounding facts at that particular time. The plaintiff was granted banking facilities to the amount of RM3.45 million. A debenture of RM3 million was given commensurable to the banking facilities of RM3.45 million. It is unlikely that the 1st defendant to have agreed to be tied up with the same value of debenture for the corporate guarantee of RM35 million given by the plaintiff to secure the loan for Jafuong.

The plaintiff further contended that the debenture was meant to cover liabilities up to RM3 million only as reflected by the debenture itself which was stamped up to RM3 million. The memorandum of charge and the resolution of the board of directors of the plaintiff also stated the figure of RM3 million (see exh. LLK2 to encl. 5). In this respect, I must agree with the submission of learned counsel for the 2nd and 3rd defendants that the corporate guarantee was executed on 21 October 1998 (see exh. LLK10 to encl. 5) and it would be totally ludicrous to expect all the documents dated and executed in 1987, to be stamped covering contingent liability coming into existence some 11 years later.

Even assuming the debenture was only up to the limit of RM3 million and would not cover Jafuong's liability, the fact remained that the plaintiff have not settled the amount due under the overdraft facilities.

Demand was made by the 1st defendant *vide* letter dated 5 January 2000 (see exh LLK13 to encl. 5). The plaintiff never denied that the amount

demanded was not due but it was not paid within the stipulated time. Thus, the 1st defendant had no recourse but to appoint the 2nd defendant as receiver and manager on 9 February 2000 as provided for under the said debenture. It must be emphasised that the tender of the conditional payment by the plaintiff *vide* its letter dated 18 February 2000 (see exh. LLK15 to encl. 5) was made after the appointment of the receiver and manager.

A glaring fact that is not to be ignored is the admission of the plaintiff in para. 28 of its statement of claim that due to the slow period in January/ February 2000, the plaintiff experienced cash flow problem and was only able to raise the amount demanded by the 1st defendant a month later ie, on 9 February 2000 (by then receiver and manager had already been appointed).

Failing to pay the sum demanded *vide* letter of demand dated 5 January 2000 within ten days is clearly a breach of cl. 3(b) of the debenture.

Issuance Of Notice Under Cl. 3 Of Debenture

The plaintiff also alleged that the 1st defendant did not give the requisite notice under cl. 3 of the debenture. Therefore, the plaintiff insisted that the 1st defendant failed to comply with the requirement of cl. 3 of the said debenture. Hence, it follows that the 1st defendant has no right whatsoever to appoint the receiver and manager. For a clearer perspective of this issue, we need to refer to cl. 3 of the debenture which provides:

> The principal moneys hereby secured shall become immediately repayable in any of the events following:
>
> (a) If the Company makes default for two (2) months in the payment of any interest hereby secured after the date when such interest becomes payable;
>
> (b) On demand being made by the Bank;
>
> (c) If a distress or execution is levied or enforced upon or against any chattels or property of the Company and is not paid out or discharged within five (5) days;
>
> (d) If an order shall be made or an effective resolution be passed for the winding up of the Company;
>
> (e) If a Receiver of the Company's undertaking or property or any part thereof shall be appointed;
>
> (f) If the company stops or ceases or threatens to cease to carry on its business; and
>
> (g) If the Company commits or threatens to commit a breach of any of the covenants or provisions herein contained and on its part to be observed and performed.

PROVIDED that on the happening of any of the events specified in sub-clauses (a) and (g) the moneys hereby secured shall nevertheless not become immediately repayable and the security shall not become enforceable unless and until the Bank shall have first served on the Company a preliminary notice requiring the company to perform or observe the covenant or provision the breach whereof is complained of and the Company shall have neglected for a period of five (5) days to comply with such notice.

It is clear that the pre-condition mentioned by the plaintiff for issuance of a notice only applies to matters in cl. 3(a) and (g) only. The overdraft facilities as provided under cl. 3(b) of the debenture is repayable on demand.

The Right To Appoint A Receiver And Manager

Under cl. 10 of the debenture the 1st defendant may at any time after the principal monies hereby secured shall have become payable by the plaintiff appoint a receiver and manager. Therefore, the 2nd and 3rd, defendants were rightly appointed as receiver and manager when the plaintiff failed to comply with the letter dated 5 January 2000.

In furtherance thereto, the plaintiff also challenged the status and appointment of Attar Salleh as the 1st defendant's lawful attorney. Clause 10 of the said debenture provides that the 1st defendant may appoint a receiver and manager by writing under the hands of the its lawful attorney or its manager or acting manager for the time being residing in Sibu, Sarawak. However, this issue was never raised in the affidavits filed by the plaintiff. The plaintiff is therefore estopped from raising this matter even in the form of submission as the defendants are in no position to reply to this point at this stage of the proceedings.

For the purpose of this application, I find that there are no serious issues or questions to be tried.

Even though the question of adequacy of damages is not relevant anymore here, I wish to touch on this issue, in passing. The plaintiff has not shown that in the event injunction is refused damages would not be an adequate remedy. In fact, in the statement of claim the plaintiff is claiming for damages to be assessed together with interest. By its own admission, the plaintiff acknowledged that damages is an adequate remedy and can be assessed and quantified. As such, there is no basis for this court to grant the injunction as sought by the plaintiff (see *Sivapureman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150).

The plaintiff also admitted in para. 28 of the statement of claim that that it experienced cash flow problem. The undertaking as to damages given by the plaintiff would be superfluous in the event that it failed in its claim against the defendants.

I am also mindful of the affidavit evidence by Khoo Chiew Seng (encl. 11), that the plaintiff's record are unsatisfactorily kept and this would result in great difficulty in tracing any assets which the plaintiff might dissipate in the event the plaintiff's application is allowed. There has been no rebuttal from the plaintiff on the apprehension of the defendants.

Ruling

On the grounds stated above, the plaintiff's application for an interim injunction is hereby dismissed with costs to the defendants.